SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1966
No. 804

JOHN G. MOFFATT, *et al.*,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief in Reply to Respondent's Brief in Opposition.

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The facts, law and reasons for issuing a writ of certiorari in these actions have been set forth and discussed in the Petition for Certiorari filed herein. There, however, are certain errors, inconsistencies, and irrelevancies upon which the respondent has predicated some of his arguments in his Brief in Opposition which require response.

1. The cited cases of *Liddon v. Commissioner,* 230 F. 2d 304 (6th Cir. 1956), certiorari denied, 352 U.S. 824; *Pebble Springs Distill. Co. v. Commissioner,* 231 F. 2d 288 (7th Cir. 1956), certiorari denied, 352 U.S. 836; *Lewis v. Commissioner,* 176 F. 2d 646 (1st Cir. 1949); *Becher v. Commissioner,* 221 Fed. 252 (2nd Cir. 1955), are not in point. Each of those cases found

that there was a "D" reorganization under the Internal Revenue Code of 1939, but the pertinent statutory language in those cases required only that there be a transfer of "all *or a part*" of the transferor's assets. §112(g)(1), Internal Revenue Code of 1939. In fact, in *Lewis v. Commissioner, supra,* the court said (at 949): "Nor does the statute make the amount of property transferred to the new corporation a decisive factor in determining whether a reorganization took place." See also, *Pebble Springs Distill. Co. v. Commissioner, supra,* at 282. In the instant cases, however, the pertinent statutory language requires a transfer of "substantially all" of the transferor's assets, for Congress has substituted these quoted words in a "D" reorganization under Sections 368(a)(1)(D) and 354(b)(1)(A) of the Internal Revenue Code of 1954 in lieu of the less restrictive words "all or a part" which were found in the 1939 Code; thus the cited cases are of no precedent in the instant actions which involve distinctly different statutory language.

2. The respondent has stated (Br. 11, fn. 5) that the petitioners ask this Court to review this case despite the absence of a conflict in the decisions and then goes on to state that this Court has expressly refused to lay down general rules with respect to the tax-free reorganization provisions. *Bazley v. Commissioner,* 331 U.S. 737, is cited as authority for the latter proposition. Although we have pointed out that there is a conflict (Pet. 14), there need be no such conflict for this Court to consider a corporate reorganization issue, for in *Bazley* itself this Court did not address itself to any such conflict but granted certiorari because the corporate reorganization question there was of "importance to the

Treasury as well as to corporate enterprise.'"[1] Id., at 739. Indeed, both of the cases which were decided in that opinion had been resolved in favor of the Government in the courts below. Additionally, this Court in the *Bazley* case did lay down the general rule that the word "recapitalization" as used in the "E" reorganization must be broadly construed, and, since that decision was handed down, it has served as a guide to the taxpayers, the Commissioner, and the courts. Likewise, as has been demonstrated in our Petition, the need for a decision with respect to the breadth of the statutory words in issue herein is equally needed in the corporate reorganization area of the revenue laws.

3. Nor does Rev. Proc. 66-34, 1966-34 Int. Rev. Bull. 22, contrary to the assertions of the respondent (Br. 11, fn. 5), establish any guidance with respect to this type of transaction. The Commissioner has indicated therein that he will "*ordinarily*" regard the "substantially all" requirements of both Sections 368(a)(1)-(C) and 354(b)(1)(A) as having been satisfied if at least 90% of the net assets and 70% of the gross assets have been transferred, but by use of the word "*ordinarily*" he has reserved freedom of action to withhold a favorable ruling even where those requirements have been met. This reservation, however, applies only to those situations where those requirements *have been met*. The implication is therefore patent—a favorable ruling will not be given in any case where those requirements *have not been met*. *See* Pet. 21-24.

4. The respondent's indecisive method of distinguishing the long-standing case of *Pillar Rock Paving*

[1]The importance of the present issue to the Treasury (Pet. 29-31) and to the corporate public (Pet. 10, fn. 5) has been well recognized.

Co. v. Commissioner, 90 F. 2d 949 (9th Cir. 1937), by stating that that case involved a "C" reorganization is clearly without merit. *See* Pet. 13, fn. 9. Even Rev. Proc. 66-34, *supra,* which the respondent claims gives guidance in this area, employs the same test in a "C" reorganization as in a "D" reorganization under Section 354(b)(1)(A).

5. The respondent has also cited (Br. 10) the recent cases of *Babcock v. Phillips,* CCH 1967 STAND. FED. TAX REP. (67-1 U.S. Tax. Cas.) Par. 9236 (10th Cir. 1967) and *Reef Corp. v. Commissioner,* 368 F. 2d 125 (5th Cir. 1966), as authority for his position, but these cases are clearly distinguishable from the instant case.[2] In *Babcock v. Phillips,* the old corporation transferred $3,827,254.76 to the new corporation and distributed to its stockholders additional assets in the amount of $506,388.80 together with certain other assets which were evidently of such a small amount that the Court found it unnecessary to value them; thus, in value, approximately 88% of its assets was transferred by the old corporation to the new corporation, whereas, in the instant actions, at most, only 64.52% of the old corporation's assets were transferred to the new corporation. In *Reef Corp. v. Commissioner,* the transferor corporation borrowed cash which it distributed to its stockholders. The taxpayer there argued that, because the cash was so distributed, "substantially all" of the assets of the old corporation had not been transferred to the new corporation. The Fifth Circuit answered that argu-

[2]The respondent also made a passing reference (Br. 10) to *Davant v. Commissioner,* 366 F. 2d 874 (5th Cir. 1966) but the court in that case did not even refer to the "substantially all" question, and there is no indication that the taxpayer therein raised such an issue.

ment by stating (at 131): "However, eliminating this cash, approximately eighty percent of the assets of Reef Fields were transferred to new Reef and this is a sufficient basis for the finding by the Tax Court". But, in the instant actions, there was no such contrived increase in the assets by taking a loan or in any other manner, and less than 80% of the assets—at most, only 64.52% —was transferred. We fail to see where holdings that transfers of approximately 88% and 80%, respectively, were transfers of "substantially all" the assets within the meaning of the statutory language are in any way inconsistent with the petitioners' position herein or support the respondent's position in any manner.

Conclusion.

For the reasons given above and in our Petition, we respectfully submit that a writ of certiorari should be granted.

Respectfully submitted,

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